STATE OF MICHIGAN

COURT OF APPEALS

THE CADLE COMPANY II, INC, Plaintiff-Appellee,	UNPUBLISHED October 17, 2006
v	No. 269833 Oakland Circuit Court
JAMES R WECHSLER, Defendant-Appellant.	LC No. 05-065950-CK

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals by right the trial court's denial of his motion for summary disposition under MCR 2.116(C)(5) and (7), and the grant of summary disposition to plaintiff under MCR 2.116(C)(10). Plaintiff in this action sought to collect on a delinquent promissory note the original payee had assigned to it. We conclude that material questions of fact remain regarding defendant's statute of limitations defense and that summary disposition was prematurely granted because discovery was not complete. We reverse and remand to the trial court.

I. Summary of Facts and Proceedings

Plaintiff commenced this collection action on defendant's December 15, 1996 promissory note for $83,244.33 payable to Wilshire Credit Corporation ("Wilshire"). Plaintiff alleged that because defendant had failed to pay the note according to its terms, he owed a principal balance of $81,693.94 when the complaint was filed on April 26, 2005. Plaintiff asserted that Wilshire had assigned the note to it on February 7, 2005, attaching to its complaint a copy of a purported note allonge.[1] Plaintiff also attached to its complaint a copy of a letter from plaintiff to defendant dated June 4, 2004, which demanded payment of the note in full together with accrued interest and late fees.

Defendant filed his answer and affirmative defenses on August 5, 2005. He admitted issuing the note to Wilshire, but neither admitted nor denied the remainder of plaintiff's

[1] An "allonge" is "[a] piece of paper annexed to a bill of exchange or promissory note, on which to write endorsements for which there is no room on the instrument itself." Blacks Law Dictionary (4th rev ed, 1968).

allegations. Defendant asserted the statute of limitations as one of his affirmative defenses. Defendant later answered some of plaintiff's interrogatories by asserting that Wilshire had informed him "repayment was not expected" on the note, and that "it was agreed that repayment would not be required."

On January 13, 2006, defendant moved for summary disposition under MCR 2.116(C)(7) on the basis that the six-year statute of limitations under MCL 600.5807(8) had expired. Defendant reasoned that because the principal balance of $83,244.33 on the promissory note bearing simple interest of 7% and requiring monthly payments of $500 had been reduced only $1,550.39 at the time of the complaint, defendant must have defaulted on the note some time in 1997. In an affidavit, defendant averred that although a May 9, 2001 automobile accident left him with memory deficits, and he had no records of payments on the note, he recalled no payments on the note after December 1996.

Plaintiff responded to defendant's motion and also moved for summary disposition under MCR 2.116(C)(10). Plaintiff neither admitted nor denied that defendant defaulted on the note in 1997, but asserted that defendant made a partial payment on the note in the mount of $250.00 on March 4, 2004, and that this partial payment revived the limitations period. Plaintiff attached a copy of a bank money order made out to "Cadle Co" bearing what appear to be the initials "JW" as the maker above the address, "31313 Northwestern Hwy #220, Farmington Hills, MI." This is the same address (absent the #220) as that of defendant's address on the 1996 note. Plaintiff reasserted that Wilshire assigned the note to it on February 7, 2005.

Defendant responded to plaintiff's motion, and added to the reasons the trial court should grant summary disposition to him. Specifically, defendant asserted plaintiff lacked capacity to bring this lawsuit, MCR 2.116(C)(5), because it was an unregistered foreign corporation, MCL 450.2051(1), and because plaintiff was acting as an unlicensed and unbonded collection agency, MCL 339.904(1). Defendant argued that plaintiff by its own admission did not acquire rights to the note until February 2005, but began acting as a debt collector with regard to the Wilshire note before that date. Further, defendant argued the allonge plaintiff produced recited no consideration, so it was legally only an assignment for purposes of collection. Plaintiff argued defendant was acting illegally as an unregistered foreign corporation and an unlicensed collection agency. On this basis, defendant asserted plaintiff's complaint should be dismissed.

Defendant also asserted that the March 4, 2004 money order did not revive the statute of limitations because the money order was payable to "Cadle Co" and not plaintiff, "The Cadle Company II, Inc." Defendant provided evidence that the "The Cadle Company" and "The Cadle Company II, Inc." are separate Ohio entities. Defendant further observed that the memo line of the money order contained a number different from the original Wilshire note number of "386611." Defendant therefore contended the money order was not a payment on the Wilshire note. Defendant also asserted in an affidavit, "I do not believe that the March 4, 2004 payment of $250 by personal money order was on the debt reflected in the 'Promissory Note.'"

Further, defendant argued that plaintiff had not established the amount it claimed was due on the note. Defendant also asserted his interrogatories to plaintiff for information and records regarding the amounts plaintiff claimed to be due, as well plaintiff's records regarding payments made on the account, had not been answered.

Plaintiff responded that it was not transacting business in Michigan because it was only collecting a debt and maintaining the instant lawsuit. MCL 450.2012(1). Also, plaintiff asserted it was not acting as a collection agent but rather only attempting to collect its own debt. MCL 339.901(b). In addition, plaintiff alleged for the first time that it had purchased the Wilshire note for a "good and valuable consideration" on April 23, 2001, and that the "allonge was signed and provided at a later date." But plaintiff did not move to amend its complaint. In support of its new allegation, plaintiff produced a copy of a bill of sale dated April 23, 2001 that on its face purports to be between Cadlerock Joint Venture II, L.P., as grantor, conveying to plaintiff: "All those certain Loans in Wilshire Consumer Obligation Structured Trust 1995-A, as set forth in the attached Exhibit 'A'." To the bill of sale, plaintiff attached a single line of a computer-generated spreadsheet indicating a loan account number 02750442, a loan number of 386611, with an unpaid principal balance of 82,175.85 as of 6-14-01, and the name, "Wechsler James R."

Plaintiff argued that with respect to the $250 money order, defendant did not deny making the payment, only that it was not intended for the debt at issue. In that regard, plaintiff noted both the original loan number and its own internal number were listed on its initial correspondence to defendant, the June 4, 2004 demand letter it had attached to its complaint. Plaintiff contended the money order had its internal file number (02750481) written on the memo line. Plaintiff argued that although the money order was payable to "The Cadle Company," that entity forwarded the payment to plaintiff who deposited it on the account at issue. Plaintiff also produced a copy of a March 12, 2004 bank deposit slip that included a $250 item on account 02750481. Thus, plaintiff argued that because the $250 payment was not accompanied by a reservation of rights, it revived the debt and restarted the statute of limitations.

In ruling on the various motions before it, the trial court first addressed defendant's claim that the statute of limitations had expired. The court observed that the notation on the March 4, 2004 money order of plaintiff's internal file number linked it to the note account. Therefore, the trial court found that plaintiff's claim the money order was payable to an entity other than plaintiff was without merit. Applying the rule stated in *Yeiter v Knights of St Casimir Aid Society*, 461 Mich 493; 607 NW2d 68 (2000), the trial court ruled that the money order payment had revived the statute of limitations.

The court next rejected defendant's claim that plaintiff lacked capacity to maintain this action. The court found that defendant had failed to satisfy it that plaintiff was a foreign corporation doing business in Michigan because MCL 450.2012(1) provides that a foreign corporation is not considered to be transacting business in this state solely because it is either maintaining legal proceeding, or collecting debts. The court also rejected defendant's claim that plaintiff was acting as an unregistered collection agency because plaintiff was only collecting its own debt it had purchased from Wilshire. Thus, the court ruled plaintiff was not a "collection agency" as defined in MCL 339.901(b).

The trial court next considered the parties' motions under MCR 2.116(C)(10). The court found there was no dispute that defendant failed to pay the promissory note, and that the undisputed evidenced established the amount due and owing on the note. Accordingly, the trial court granted summary disposition in favor of plaintiff and denied defendant's motion. On March 15, 2006, the trial court entered judgment for plaintiff for the principal amount of $81,693.94, interest of $22,307.10, late fees of $500, and reasonable costs and attorney fees.

Defendant moved for rehearing or reconsideration, asserting that the account number on the money order that the trial court relied on was in different handwriting from that of the maker of the money order. Further, defendant argued that summary disposition was prematurely granted because plaintiff had not answered defendant's interrogatories that bore directly on the statute of limitations issue.

The trial court denied defendant's motion for reconsideration, rejecting defendant's first argument because defendant had not submitted admissible evidence addressing it before the motion for summary disposition was argued. The trial court also ruled that defendant's request for discovery did not stand a fair chance of uncovering factual support for defendant's position, so granting summary disposition before discovery had been completed was proper.

II. Standard of Review

This Court reviews de novo a trial court's determination to grant or deny summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). A party may support or oppose a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence but the substance or content of the supporting proofs must be admissible in evidence. MCR 2.116(G)(6); *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). The trial court must accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions. *Id*. at 26; *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). If there are no material facts in dispute, whether a claim is barred by the statute of limitations becomes a question of law for the court to decide. *Dewey v Tabor*, 226 Mich App 189, 192; 472 NW2d 715 (1997); *Baker v DEC International*, 218 Mich App 248, 253; 553 NW2d 667 (1996), aff'd in part, rev'd in part 458 Mich 247; 580 NW2d 894 (1998). However, if material facts are disputed, summary disposition is inappropriate. *Id*.

A claim that a corporation lacks a requisite license or cannot otherwise lawfully transact business in this state is essentially a claim that the corporation lacks the legal capacity to sue. MCR 2.116(C)(5); *Thomas Industries, Inc v Wells*, 403 Mich 466, 469; 270 NW2d 98 (1978). Such a motion is treated the same as one brought under MCR 2.166(C)(7). See MCR 2.116(G)(2), (5), & (6); *Rohde v Ann Arbor Public Schools*, 265 Mich App 702, 705; 698 NW2d 402 (2005). We review the entire record to determine whether the defendant was entitled to judgment as a matter of law. *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden, supra* at 120. The trial court and this Court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. But a court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Summary disposition under C(10) is properly granted when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

In general, a trial court prematurely grants a motion for summary disposition if it does so before discovery on a disputed issue is complete. *Peterson Novelties, Inc v City of Berkeley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). But where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion, summary disposition may properly be granted before discovery is complete. *Village of Dimondale v Grable,* 240 Mich App 553, 566; 618 NW2d 23 (2000).

III. Analysis

Defendant first argues that the trial court erred by granting summary disposition to plaintiff because the court ignoring evidence that supported his lack of capacity arguments. According to defendant, plaintiff was acting as an unregistered foreign corporation and as unlicensed collection agency, which voided the debt ab initio. We disagree. The trial court did not err by ruling that plaintiff was exempt from the registration requirements of MCL 450.2051 because defendant produced no evidence that plaintiff transacted any business in Michigan other than maintain this proceeding or attempt to collect a debt, both of which are excluded from activities "considered to be transacting business in this state." MCL 450.2012(a) and (h). Although the evidence created a disputed issue of fact as to whether plaintiff perfected its ownership of the note before February 7, 2005, the trial court did not err by denying defendant's claim that an alleged violation Michigan's collection practices act (MCPA), MCL 339.901 *et seq.* would merit voiding the note. Accordingly, defendant's argument on this issue provides no basis for concluding the trial court erred by granting plaintiff's motion for summary disposition.

Plaintiff's complaint, which it never sought to amend, alleged the Wilshire note had been assigned to it on February 7, 2005 by the allonge attached to the complaint. In response to defendant's motion for summary disposition, plaintiff asserted the note was actually assigned to it on April 23, 2001. But plaintiff produced no admissible evidence that the note was transferred to it before February 7, 2005. At best, the bill of sale dated April 23, 2001 that plaintiff produced represented no more than a transfer between entities apparently controlled by Daniel C. Cadle. More important, the bill of sale and its single line computer spread sheet regarding the note account is not evidence that Wilshire Credit Corporation ever assigned the note to either the Wilshire Consumer Obligation Structured Trust 1995-A or to Cadlerock Joint Venture II, L.P.

Plaintiff also attempts to supplement the record on appeal by attaching to its brief a purported copy of the first page of a March 26, 2001 "portfolio sale agreement" between "Fog Cap, L.P., a Delaware limited partnership ("Seller"), and Cadlerock Properties Joint Venture II, L.P., an Ohio limited partnership, and Cadlerock Joint Venture II, L.P., an Ohio limited partnership (together "Purchaser")." Plaintiff may not supplement the record on appeal with evidence that was not presented to the trial court when deciding the motions for summary disposition. *Maiden, supra* at 126 n 9. But even if it were proper to consider the "portfolio sale agreement," it also provides no evidence that Wilshire assigned the promissory note to anyone.

The question remains whether plaintiff produced any evidence it owned the promissory note before it began its collection efforts in Michigan. In an action on a note, it is the plaintiff that bears the burden of proving it is the owner. *Barnes v Poet*, 77 Mich 391, 395; 43 NW 1025 (1889). But possession of an endorsed note is presumptive proof of ownership. *Id.*; *Reed v McCready*, 170 Mich 532, 540; 136 NW 488 (1912). Under the uniform commercial code (UCC), the promissory note in this case is a negotiable instrument because it is payable to a

named person (Wilshire) or to order, at a definite time or on demand, and does not contain an undertaking other than the payment of money. MCL 440.3104. The UCC provides that the transfer of possession of a negotiable instrument with or without its endorsement, "vests in the transferee any right of the transferor to enforce the instrument." MCL 440.3203(2). But "if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder." MCL 440.3201(2). In this case, plaintiff only produced evidence of presumptive ownership by endorsement as of February 7, 2005. Indeed, defendant does not contest plaintiff's ownership of the note after date. Yet, the "demand letter" plaintiff attached to its complaint is an admission it was engaged in collection activity in Michigan well before then. Moreover, in pleadings below and on brief in this Court, plaintiff acknowledges its efforts at collecting the note in Michigan began in April 2001, well before the disputed money order payment of March 4, 2004.

Both parties rely on *Asset Acceptance Corp v Robinson*, 244 Mich App 728; 625 NW2d 804 (2001) to support their arguments. We find that case is factually distinguished from the present case because plaintiff never produced evidence that the promissory note was assigned to it for valuable consideration before it began collection activity. In *Asset Acceptance Corp*, this Court decided the MCPA did not apply to the plaintiff because the original owner of the account "immediately sold [the] defendant's account to Guardian National Acceptance Corporation (GNA). On June 27, 1997, [the] plaintiff purchased [the] defendant's account from GNA. The purchase agreement states that GNA conveyed all of its interests in the accounts to [the] plaintiff for value." *Asset Acceptance Corp, supra* at 732. Thus, in that case, the plaintiff produced evidence tracing its chain of title back to the original owner and that it acquired the account for value. In contrast, plaintiff failed to produce any admissible evidence of ownership of the note before February 7, 2005.

For these reasons, we find that the record raises a question of fact as to whether plaintiff began its collection activity before perfecting its ownership of the note. Nevertheless, defendant's argument that a violation of the MCPA would require voiding the underlying debt obligation is without merit. First, defendant argues by analogy the remedies available to defend actions by unlicensed contractors should apply, citing *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002). But that case applied the clear language of a statute that provides:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract. [MCL 339.2412(1).]

Our Supreme Court held that Millen's failure to obtain a residential builder's license barred it from seeking compensation for installing slate on the Stokes' roof because Millen was unlicensed and his construction lien was invalid. *Stokes, supra* at 673. Further, the Court held that Millen could not obtain equitable relief because "such relief would allow equity to be used to defeat the statutory ban on an unlicensed contractor seeking compensation for residential construction." *Id*.

In contrast to the statutory remedy applicable to an unlicensed contractor, the remedy the Legislature provided for a violation of the MCPA is quite different. MCL 339.116 provides for a civil action for damages resulting from a violation of the MCPA and for equitable relief. Because the statute provides a civil remedy for its violation, not voiding or preclusion of collection on the underlying debt, we conclude defendant's argument on this issue lacks merit.

Moreover, the record indicates plaintiff only engaged in interstate communications with defendant attempting to collect the debt before it became the undisputed owner of the note on February 7, 2005. The MCPA specifically exempts from its licensing requirement persons whose "collection activities in this state are limited to interstate communications." MCL 339.904(2). Although such persons are not exempt "from other requirements of law that regulate collection practices," *id*., defendant alleges no other violations except lack of a bond required by MCL 339.907. Because plaintiff was not required to be licensed, it was not required to be bonded.

We conclude for all of these reasons that the trial court did not err by denying defendant's motion for summary disposition under MCR 2.116(C)(5). Further, defendant's arguments that plaintiff violated the MCPA and was an unregistered foreign corporation under MCL 450.2051 did not require the trial court to deny plaintiff's C(10) motion for summary disposition.

Defendant next argues that the trial court erred by finding the March 4, 2004 money order revived the right to enforce the delinquent note after the expiration of the six-year statute of limitations, thus permitting the trial court to grant plaintiff summary disposition. Defendant contends the money order did not meet the requirements of MCL 600.5866 because it was not payable to plaintiff and contained writings of questioned origin that the trial court improperly employed to link the money order to the Wilshire promissory note. We agree with defendant that the evidence before the trial court raised disputed issues of material fact whether defendant acknowledged the Wilshire debt with the March 4, 2004 money order payable to "Cadle Co" as a partial payment. Consequently, the trial court erred by deciding as a matter of law that the money removed the bar of the statute of limitations. *Dewey*, *supra* at 192; *Baker*, *supra* at 253.

A cause of action on a promissory note accrues when the claimed breach of the promise first occurs and must be brought within six years thereafter. *Federal Deposit Ins Corp v Garbutt*, 142 Mich App 462, 468; 370 NW2d 387 (1985). "The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract." MCL 600.5807(8). The UCC provides that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within 6 years after the due date or dates." MCL 400.3118(1).

The $83,244.33 note defendant gave Wilshire on December 15, 1996 had a maturity date of December 15, 2016. Defendant promised to pay Wilshire $500 on the note commencing January 15, 1997, and to pay $500 monthly thereafter until making a final payment of $76,381.81 at maturity. When plaintiff filed its complaint on April 26, 2005 it alleged that defendant owed a principal balance on the note of $81,693.94. In an affidavit, defendant asserted he believed that he had made no payments on the note after December 1996. Plaintiff did not produce evidence to show when defendant first breached his promise to make monthly payments on the note but did not dispute defendant's argument that absent the March 4, 2004 money order payment, the six-year limitation period had expired when plaintiff filed its

complaint. Thus, the parties and the trial court addressed whether the March 4, 2004 money order revived the statute of limitations. The trial court ruled that it had, citing *Yeiter, supra*.

First, we find that defendant misses the mark by arguing that the money order does not meet the requirements of MCL 600.5866, which provides:

> Express or implied contracts which have been barred by the running of the period of limitation shall be revived by the acknowledgment or promise of the party to be charged. But no acknowledgment or promise shall be recognized as effective to bar the running of the period of limitations or revive the claim unless the acknowledgment is made by or the promise is contained in some writing signed by the party to be charged by the action.

Neither the trial court nor plaintiff relied on this statute. Rather, both relied on the common-law rule stated in *Yeiter* that "a partial payment restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation." *Yeiter, supra* at 497. The *Yeiter* Court cited and "accept[ed] the summary provided by the authors in 20 Michigan Law & Practice, Statute of Limitations, § 12, pp 560-564." *Yeiter, supra* at 497 n 6. Although the treatise cites MCL 600.5866 and its predecessor (1948 CL 609.25), the *Yeiter* Court does not. Instead, the Court noted that the "rule is at least as old as *Miner v Lorman*, 56 Mich 212, 216; 22 NW 265 (1885)." *Yeiter, supra* at 498.

The Court in *Miner* discussed a predecessor of § 5866 (how § 8725), which like the current version, provided that to remove the bar of the statute of limitations a promise or acknowledgement must "'be made or contained by or in some writing, signed by the party to be charged thereby.'" *Miner, supra* at 215, quoting How § 8725. Justice Cooley observed that the plaintiff in *Miner* had "no promise in writing, and relies wholly on the payments which he testifies were made at the time of the accounting." *Miner, supra* at 215. Justice Cooley then stated the rule as quoted by the Court in *Yeiter*:

> "The statute does not prescribe what effect part payment of a demand shall have, but it is familiar law that it operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of the statute of limitations, of any such laps of time as may have occurred previous to the payment being made. The payment is not a contract; it is not in itself even a promise; but it furnishes ground for implying a promise in renewal from its date, of any right of action which before may have existed." [*Yeiter, supra* at 498, quoting Justice Cooley in *Miner, supra* at 216.]

This passage makes clear that it is not the statute but "familiar law," i.e., the common law, that the Court in *Miner*, and more recently in *Yeiter*, applied.

Discussing the application of this rule, the *Yeiter* Court observed that, "'part payment of a debt barred by the statute of limitations does not remove the bar, if accompanied by any fact or circumstance inconsistent with a promise to pay the remainder.'" *Yeiter, supra* at 497 n 6, quoting Michigan Law & Practice, *supra* at 561. Further, "in order to remove or toll the bar of limitations, it is necessary not only that the payments be made, but that they be made on the

identical debt sued on, with the intention thereby of recognizing the entire debt; a debt barred by limitations cannot be revived by a subsequent transaction having no relation to the former debt . . . ." *Id*. at 560-561. Where a partial payment or its circumstances are disputed, the issue of whether a purported payment revives a debt barred by the statute of limitations becomes a question of fact for the jury or the court sitting as the fact finder to resolve. *Baker, supra* at 253; See, also, *Myers v Erwin*, 180 Mich 469, 472-473; 147 NW 458 (1914), and *Hollywood v Reed*, 55 Mich 308, 310-311; 21 NW 313 (1884).

In this case, defendant disputed whether he sent the $250 money order to plaintiff as a partial payment on the Wilshire note. Defendant averred that he believed he made no payments on the Wilshire note after December 1996. Parts of the money order, specifically the initials and address of the maker, indicate that defendant was its maker. But the trial court erred by finding as matter of fact that the writings on the memo section of the money order (02750481 Wechsler), connected the money order to the Wilshire note. To do so, the trial court must have first concluded that defendant made or authorized these notations. Although defendant did not argue this point until his motion for reconsideration, the fact that that the memo and maker's initials and address are written in different handwriting is readily apparent from the face of money order itself. If one of plaintiff's employees or an employee of the Cadle Company to whom the money order was payable wrote the memo, it is not logically relevant to whether defendant, if he made the payment, intended thereby to acknowledge his obligation to pay the entire Wilshire note. *Yeiter, supra* at 497 n 6; Michigan Law & Practice, *supra* at 560-561. See *Hiscock v Hiscock*, 257 Mich 16, 20; 240 NW 50 (1932) (an endorsement or receipt made and retained by the mortgagee was not evidence of part payment by the mortgagor). This same rule of logic has been codified in § 5865 of the Revised Judicature Act:

> *No* endorsement or *memorandum of any payment*, written or placed upon any promissory note, bill of exchange, or *other writing, by or on behalf of the party to whom the payment was made* or was purported to have been made, *shall be allowed as evidence of the payment for the purpose of barring the running of the period of limitations*. This section merely limits the evidence which may be allowed to be given for the purpose of showing part payment which would bar the running of the period of limitations, and is not to be deemed to have any control over the effect of part payment which is proved by other evidence. [MCL 600.5865 (Emphasis added).]

Under the plain language of § 5865 and the rule of logical relevance, the memo on the money order if not made or authorized by defendant is not evidence of his intent to acknowledge and make a partial payment on the Wilshire note. Likewise, the deposit slip that plaintiff produced regarding the money order is not evidence of defendant's intent to acknowledge and make a partial payment on the Wilshire note. See *Albers v Pommerening*, 283 Mich 389; 278 NW 108 (1938), where the Court applied the predecessor of § 5865 to hold that a deposit slip prepared by one of the plaintiff's employees was not evidence that the defendant made a disputed payment to revive a time-barred debt. *Id*. at 391, 395.

In addition, the money order was made payable to an entity other than plaintiff. Plaintiff admits that the Cadle Company is a separate entity that initially received the money order payment but forwarded it to plaintiff. Moreover, plaintiff never produced clear evidence establishing its chain of title to the Wilshire note at the time of the money order payment. These

factors together with defendant's denial raised the material issue of fact as to whether defendant made the payment to plaintiff intending thereby to make a partial payment on the Wilshire note. The trial court erred by making factual findings to decide this disputed issue of fact in plaintiff's favor on a motion for summary disposition. *Skinner, supra* at 161; *Baker, supra* at 253. Accordingly, we reverse the trial court's grant of summary disposition to plaintiff and remand this case for further proceedings.

Moreover, we conclude that the trial court erred by prematurely granting summary disposition in favor of plaintiff before permitting defendant to complete discovery. *Peterson Novelties, supra* at 24-25; *Village of Dimondale, supra* at 566. On December 1, 2005, the trial court extended discovery in this case by stipulated order to January 17, 2006. Defendant served plaintiff with interrogatories and requests for documents on January 6, 2006. Without answering defendant's discovery requests, plaintiff moved for summary disposition under MCR 2.116(C)(10) on January 17, 2006. Defendant responded to the motion by asserting, among other arguments, that plaintiff had not yet complied with his request for discovery. At the hearing on the parties' various motions, defendant again argued that plaintiff had not answered his discovery requests. After the trial court granted plaintiff's C(10) motion, defendant raised plaintiff's failure to comply with discovery once again in his motion for reconsideration.

If further discovery were permitted here, it would stand a fair chance of uncovering evidence regarding plaintiff's claim to title to the note before its endorsement by Wilshire. Further discovery would also likely uncover evidence regarding the relationship and communications between plaintiff and defendant around the time of the money order payment. Such evidence would bear directly upon the disputed issues of fact regarding the statute of limitations. In addition, defendant disputed the balance, interest, and fees claimed to be due but was not permitted to explore the accuracy of plaintiff's claims through discovery. Accordingly, on remand, the trial court should permit further discovery before entertaining further motions for summary dispositions.

Because of our resolution of the foregoing issues, we decline to address defendant's argument regarding attorney fees.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot